Department of Justice Canada | Ministère de la Justice Canada | Canada

SPEECH BY THE HON. IRWIN COTLER, MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA
ON THE OCCASION OF AN APPEARANCE BEFORE THE SPECIAL COMMITTEE OF THE SENATE ON THE ANTI-TERRORISM ACT

Monday, February 21, 2005

Honourable Senators, I am pleased to appear before you this morning and participate in this examination of the *Anti-terrorism Act*, and which in section 145 of this *Act* has mandated "a comprehensive review of the provisions and operations of the *Act*."

I am also delighted to see that many Committee Members now conducting this review were also Members of the Special Senate Committee on Bill C-36.

I am sure that your previous experience with, and knowledge of, the legislation will be of benefit to the government and to all Canadians.

What I propose to do this morning is to share with you some of the foundational principles – and related values and policies that underpin the *Anti-terrorism Act* - and my approach to it.

I say this because in the years since 9/11, I have participated in a series of conferences on counter-terrorism, where the organizing theme – as in your own exchanges with my colleague, Anne McLellan, Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness - often found expression in the question, "how much of our freedoms should we give up?"

The problem, if I may suggest, is that such questions may, however inadvertently, invite an inquiry into the freedoms to be surrendered, as distinct from the rights to be secured; a discourse on the dangers to our democratic way of life from counter-terrorism law rather than on the safeguarding of democracy itself from the terrorist threat; a characterization of the *Anti-Terrorism Act* in terms of national security versus civil liberties – a zero sum analysis—when what is involved here is "human security" legislation that purports to protect both national security and civil liberties.

May I turn now to the foundational principles that underpin our anti-terrorism law.

Principle 1: *The Relationship Between "Security" and "Rights"*

The underlying principle here is that there is no contradiction in the protection of security and the protection of human rights. That counter-terrorism itself is anchored in a twofold human rights perspective.

First, that transnational terrorism — the slaughter of the innocents — constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants - the right to life, liberty, and security of the person. Accordingly, counter-terrorism is the promotion and protection of the security of a democracy and fundamental human rights in the face of this injustice — the protection, indeed, of human security in the most profound sense.

At the same time, and this is the second and related human rights perspective imbedded in the relationship between counter-terrorism and human rights, the enforcement and application of

counter-terrorism law and policy must always comport with the rule of law. Minorities must never be singled out for differential and discriminatory treatment. That torture must always and everywhere be prohibited. That counter-terrorism must not undermine the very human security we seek to promote and protect by that counter-terrorism.

Principle 2: *Jettisoning "false moral equivalencies": Towards a "Zero Tolerance" Principle re Transnational Terrorism*

One of the more important – yet oft ignored – dynamics inhibiting the development of a principled counter-terrorism law and policy has been the blurring of the moral and juridical divides occasioned by the mantra that "one person's terrorist is another person's freedom fighter." Indeed, the repeated invocation of this moral and legal shibboleth has not only undermined intellectual inquiry, but its moral relativism – or false moral equivalence – has blunted the justificatory basis for a clear and principled counter-terrorism law.

Simply put, the idea that one person's terrorist is another person's 'freedom fighter' cannot underpin any principled approach to anti-terrorism law. Freedom fighters don't set out to capture and slaughter schoolchildren; terrorist murderers do. Freedom fighters don't blow up trains or busses containing noncombatants; terrorist murderers do. Democracies cannot allow the word 'freedom' to be associated with acts of terrorism.

Accordingly, U.N. Security Council Resolution 1377 reaffirmed "its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed."

In a word, the underlying principle here, for the Canadian government – or for the United Nations - must be that terrorism from whatever quarter, for whatever purpose, is unacceptable; that there must be a Zero Tolerance Principle for transnational terrorism, just as there is a Zero Tolerance Principle for racism.

Principle 3: *The Contextual Principle*

The third principle is what might be called the *contextual principle*. By the contextual principle, I am referring to the approach that was taken by the Supreme Court of Canada, which in its jurisprudence noted that Charter rights, and any limits imposed on them, must be analysed not in the abstract, but in the factual context that gives rise to them.

It is clear is that, as Professor Paul Wilkinson stated in his testimony before the Parliamentary Standing Committee on Justice and Human Rights, "We passed a strategic watershed on September 11."

I would add that we passed a juridical watershed, domestically and internationally. Accordingly, any anti-terrorism law must factor into it an appreciation of the contextual principle - the nature and dimensions of this transnational terrorist threat. This would include:

- the increasingly lethal face of terrorism as in the deliberate mass murder of civilians in public places;
- the growth and threat of destructive economic and cyber terrorism, which seeks to paralyse the civilian infrastructure;
- the sophistication of transnational communications, transportation and financial networks;
- the increasing incidence of "suicide bomber" terrorism underpinned by radical extremism or fanaticism;
- the potential access to, if not prospective use of weapons of mass destruction; and, of particular relevance to this contextual approach,

- the increased vulnerability of open and technologically advanced democratic societies like Canada to this genre of terror.

Principle 4: *The International Criminal Justice Model*

In brief, we are not dealing with your ordinary or domestic criminal, but with the transnational super-terrorist: not with ordinary criminality, but with crimes against humanity; not with your conventional threat of criminal violence, but with a potential existential threat to the whole human family.

In a word, we are dealing with Nuremberg crimes and Nuremberg criminals, with *hostis humanis generis*, the enemies of humankind. In that sense, the domestic criminal law due process model, standing alone, is insufficient. For the juridical war on terrorism cannot be fought here – or won – by one country alone.

Accordingly, the international criminal justice model finds expression in Bill C-36, in the domestic implementation by Canada of the twelve international anti-terrorism conventions, as well as those undertakings mandated by the United Nations Security Council Resolutions.

In sum: the *Anti-Terrorism Act* is intended not only to mobilize the domestic legal arsenal against international terrorism, but to help build and strengthen the international mechanisms to confront the new supernational terrorism.

Principle 5: *The Prevention Principle*

A core concept of our anti-terrorism law - and of United Nations Security Council Resolutions 1373 and 1377 - proceeds from a culture of prevention and pre-emption, as distinct from reactive, after the fact, law enforcement. This includes the range of international terrorist offences domesticated into Bill C-36 – which seek to disable and dismantle the terrorist network itself – as well as the investigative and procedural mechanisms, such as preventive arrest and investigative inquiry, that seek to detect and deter, rather than just prosecute and punish.

Principle 6: *The Proportionality Principle*

As the Supreme Court of Canada instructed in *R* v. *Oakes*, "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right and the objective which has been identified as of sufficient importance."

The proportionality principle – that the juridical response to terrorism must be proportional to the threat – requires that we factor into our assessment of our anti-terrorism law the dangers of the contemporary transnational terrorist threat so that we can appreciate whether our response meets the rights based proportionality test.

Accordingly, while the terrorist threat has crossed a strategic and juridical watershed so as to comport with the first requirement of the proportionality test – that there be a substantial and pressing objective for the limitation of any Charter right - it must still pass constitutional and policy muster in respect of the three prongs of the "remedial means" part of the proportionality test: that there be a rational basis for the remedy that is tailored specifically to the objective; that the remedy intrude upon Charter rights as little as possible and that the effect or cost of the legislation – particularly in its impact on our civil liberties – not outweigh its purposive and remedial character.

Thus, while we are dealing with special legislation, responding to an extraordinary threat, that legislation must still comport with the principle of proportionality – of just remedies serving just objectives. As Professor Mendes has noted, "as our world gets more dangerous, the law and

justice of proportionality will become one of the most foundational principles that constitutional democracies around the world must strive to adhere to."

Principle 7: *The Comparativist Principle*

In a word, in determining the justificatory basis for Bill C-36, Parliament had recourse to comparative anti-terrorist legislation in other free and democratic societies, such as the UK, the US, Australia, France, Germany, and the like.

The importance of this, and the experience gained from it, was not only to appreciate what other free and democratic societies were doing, but to understand that all other free and democratic societies had enacted or were enacting anti-terrorist legislation; and that the purpose of these enactments – looking at their *travaux préparatoires* – was to protect those societies and allow them to remain free and democratic.

This does not mean – nor should it to be inferred – that just because we look at other free and democratic societies – and find our legislation preferable – that we have thereby satisfied the threshold requirements of our Charter and our Canadian principles and values.

I make reference to the comparativist principle because it formed part of the review process in drafting the legislation, and the Supreme Court of Canada has looked and will look to the comparativist principle in terms of its appreciation of the constitutionality of legislation.

Principle 8: *Due Process Safeguards*

While I have argued earlier that an analysis of our anti-terrorism law should proceed from a more inclusive, international criminal justice model, this does not mean that the domestic due process model is unimportant or irrelevant. On the contrary – and here I speak as one who has defended political prisoners in different parts of the world, many of whom have themselves been charged with acts of terrorism - the domestic due process model is a necessary model and safeguard, and one that has to be included in our appreciation of the foundational underpinnings of the legislation.

Principle 9: *The Minority Rights Principle*

This principle addresses the particular concern of protecting visible minorities from being singled out for differential and discriminatory treatment in the enforcement and application of anti-terrorism law. This was also a central concern in the submissions of civil libertarian and Muslim groups before the Standing Committee on Justice and Human Rights, which considered Bill C-36 at the time. Indeed, in their brief to the Justice Committee, at the time, the Coalition of Muslim Organizations argued that the fallout from the government's anti-terrorism law and policy would be differentially and discriminatorily borne by Muslim Canadians; and that submission has continued to find expression in the concerns respecting racial profiling.

May I reiterate again what has been my longstanding principle and policy in this matter: that discriminatory practices including the targeting of minorities have no place in law enforcement and security and intelligence work; that we are committed to ensuring that the operation of the *Anti-Terrorism Act* does not have a discriminatory impact on members of ethno-cultural and religious minorities; that racial profiling is itself a form of racial discrimination and undermines the constitutional right to equality.

Principle 10: *The Anti-Hate Principle*

This principle – yet another variation of the minority rights principle - seeks to protect visible minorities from any Hate on the Internet or in the public communications sphere, which can have the effect, not only of singling them out as targets of hatred, but also as targets of terrorist acts.

Thus, our anti-terrorism law includes important provisions that would allow the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site. As well, there are *Criminal Code* amendments that would create a new offence of mischief motivated by bias, prejudice or hate based on religion, race, colour or national or ethic origin, committed against a place of religious worship or associated religious property.

In addition, there are amendments to the *Canadian Human Rights Act* to make it clear that using telephone, Internet, or other communication tools for hatred purposes or discrimination is prohibited. This is particularly important in light of the Internet's ability to "extend the potential reach of hate messages to millions."

Principle 11: *The Oversight Principle*

This is a particularly important principle which finds expression in oversight mechanisms in the anti-terrorism law to ensure both parliamentary and public accountability. I am referring to

- the application of the *Canadian Charter of Rights and Freedoms*;
- the application of International Human Rights norms;
- the annual reports of the Minister of Justice and Solicitor General to Parliament and the counterpart reports to the provincial legislature;
- the importance of the Information and Privacy Commissioners' oversight;
- the requisite authorization or consent by the Minister of Justice for prosecutorial purposes of terrorist offences;
- the enhanced judicial capacity regarding certain offences and investigative mechanisms under the Act;
- the mandatory three year parliamentary review; and
- a sunset clause for the provisions respecting preventative detention and investigatory hearings, and the like.

In addition to judicial and Parliamentary oversight the media, NGOs, and an engaged civil society also oversee the operation of the Act and, therefore, promote the Act's overall integrity and efficacy.

Conclusion

Madam Chair, today this Committee has the advantage of examining the Act with the perspective that comes only with time. In undertaking this Review, you will have the benefit of three years experience with the legislation in force, with the expertise and experience of those officials and academics – Canadian and international – that you choose to call; with the wisdom and guidance provided by our courts; and with the experience of our diverse communities that make up the Canadian mosaic.

The importance of this legislation cannot be understated. Canadians need to be reassured that their government has both done all we can to protect them against terrorist acts without unnecessarily infringing on their individual rights and freedoms. In effect, in developing a comprehensive anti-terrorism law, the challenge is not one of balancing the protection of national security with the protection of human rights but one of re-conceptualizing human rights as including national security and vice versa. The inquiry is not one of the freedoms that should be surrendered, but of the rights that should be secured. The two are inextricably linked.

Accordingly, the Government of Canada must have a principled approach to the protection of security and human rights which we share with this Committee as we have sought to build upon it in our relationships with our international partners and in our work with our provincial

counterparts. To this end, I am pleased that an FPT Working Group on Terrorism is being established to ensure a comprehensive, integrated and coordinated strategy to address terrorism

Honourable Senators, your valuable work on Bill C-36 and the recommendations that were forwarded by the Special Committee on Bill C-36, enhanced and strengthened this legislation. Similarly, we are looking forward to the outcome of your deliberations in the months ahead and, in particular, to receiving your views on the provisions and operation of the legislation.

I am looking forward to hearing the submissions and testimony of the witnesses that will be appearing before you and, if invited, I would also be pleased to appear before you once again.

I wish you every success as you begin this review and I welcome your questions and comments.

Date Modified: **2008-04-14**